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UPDATES AND BEST PRACTICES

Businesses, employers, and employees face constant changes in statutes, regulations, and laws. Staying current on these changes is vital to the effective operation of business and to safeguard rights and interests.

This newsletter provides quarterly updates and reminders of best practices for businesses located or operating in the state of Utah.

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DISCLAIMERS IN EMPLOYEE HANDBOOKS AND DOCUMENTS

By: James W. Stewart

Placement of at-will employment disclaimers in employee handbooks, employment applications, and in personnel evaluations are keys to creating and maintaining an at-will employment relationship with employees. Such disclaimers play a critical role in preventing successful lawsuits and could save your company tens of thousands of dollars in unnecessary litigation costs. While businesses should consult with an attorney to determine the specific disclaimers that should be included in any employment document given to an employee, the following disclaimers should be considered, included, or at least discussed with legal counsel:

An Employee Handbook is Not a Promise or Contract

At the beginning of an Employee Handbook there should be a statement such as the following: "This handbook and the policies contained herein do not in any way constitute and should not be construed as a contract or agreement, express or implied, of employment between the employer and the employee, or a promise of employment. This handbook provides policy guidelines only and should not be relied upon as a definite statement of policies."

Reservation of Right to Change Company Policies

The beginning of an Employee Handbook should also conspicuously advise the employee that the Company guidelines may be modified at any time, at the discretion of the Company. While a Company is typically free to run its business as it sees fit, in wrongful termination litigation, the failure to have an express reservation to modify company policy may prevent the Company from making the modifications effective to employees hired before the modifications were in place. *See Eardman v. Bethlehem Steel Corp. Employee Benefit Plans*, 607 F. Supp. 196 (W.D.N.Y, 1984) (company unable to terminate social insurance plan). While Utah may generally recognize the employer's unilateral right to modify the employment relationship, such "reservation" language will help prevent an argument to the contrary.

Sample Handbook Language:

Regardless of the contents of this Handbook, the Company reserves the right to modify, amend, alter, revoke or otherwise deviate from any policy, practice or employment condition at any time, with or without notice, in its sole discretion. The policies stated in this Handbook are subject to change at the sole discretion of the Company, at any time, without notice.

Disclaimers at Large

Disclaimers are appropriate in several parts of a handbook. At a minimum, an at will disclaimer should be placed in the introductory portion of the handbook so it is conspicuous, and also placed in the acknowledgment form where an employee signs and acknowledges receipt of the handbook. Also, at-will disclaimers should be placed on written employment applications and a company's personnel evaluation forms, to help prevent employee arguments that such documents altered the at-will employment relationship.

General At-Will Disclaimer

A conspicuous at-will disclaimer at the beginning of the handbook is important to prevent the argument that an implied employment contract exists between the employer and employee. *Hodgson v. Bunzl Utah, Inc.*, 844 P.2d 331, 334 (Utah 1992) ("this Court has held that when an employee handbook contains a clear and conspicuous disclaimer of contractual liability, any other agreement terms must be construed in light of the disclaimer.")

Sample Handbook Language

The Company is an "AT-WILL" Employer, which means both the Company and its employees retain the right to terminate the employment relationship at any time, with or without notice, and for any reason or for no reason at all.

No provision of this Handbook should be construed as creating a contact of employment between the Company and any of its Employees. Either you or the company may terminate the employment relationship at any time, with or without reason or notice.

Except as otherwise provided in a writing signed by the Company President, all employees of the Company are employed "AT-WILL," meaning that either the Company or the employee can end the employment relationship at any time for any reason, or no reason.

Authority to Bind the Company and Disclaimer of Oral Representation (At-Will)

Discharged employees may allege in a lawsuit that they have been given oral assurances that their employment would last for a specific period, or that they could not be terminated except for cause. The employees may claim that someone in a supervisory or hiring capacity said things to them at the time of employment or thereafter which led them to believe that the "at-will" employment relationship did not apply to them.

Sample Handbook Language

No supervisor, manager or representative of the Company, other than the [specify officer] has the authority to enter into any agreement with you for employment for any specified time or make any commitments contrary to the foregoing at-will relationship of your employment.

Other Employee Handbook Sections for Disclaimers

Probationary. Specific probationary periods for new employees is probably risky since employees who satisfactorily complete such a period may feel a heightened sense of job security and claim they can then not be terminated except for cause. However, if your company allows a probationary period, refer to it as an "orientation period" or "introductory period" and reaffirm that employment is at-will.

Sample Handbook Language

The successful completion of this introductory period should not be construed as creating a contract or as guaranteeing employment for any specific duration or otherwise altering the at-will nature of your employment.

Progressive Discipline and Employee Conduct

Employers often include in their employment practices, whether written or informal, a graduated disciplinary procedure for punishable offenses. Some offenses may be minor and discipline for such action may be a verbal warning, or a note to the personnel file. Some companies have written policies which provide graduated levels of discipline, ultimately resulting in discipline or dismissal. In either instance, the employee handbook should fully reserve discretion to the Company regarding decisions on discipline or termination. Include in a list of offenses resulting in discipline or discharge a catch-all category (e.g., dishonesty, insubordination or incompetence, conduct that does not serve the best interest of Company) to ensure maximum flexibility in your options. Affirm that any rule or violation list is not all-inclusive, and that regardless of the list of offenses which may be the subject of discipline or discharge, the Company reserves the right to terminate at-will for any reason, or no reason. Make certain the procedures are realistic for your company. If they are not, don't put them in the Handbook.

Sample Handbook Language

It is not possible or desirable to identify every possible infraction and employees must observe reasonable standards of conduct and may be disciplined when they do not. Furthermore, this list is not all inclusive nor does it alter the at-will relationship between the Company and the employees and accordingly, nothing in this Handbook should be construed as a promise of specific treatment in any given situation.

Complaint Resolution

Many companies have a policy for employees to discuss problems or air grievances, such as an "open door" policy or internal review. While such policies can be very beneficial to companies, they may also create implied contracts. Highlight the discretionary "guideline" nature of the handbook. Reaffirm the right to terminate at any time.

Sample Handbook Language

This policy is set forth merely as a guideline. It does not alter the at-will relationship between an employee and the Company. Implementation of this policy should not be construed as preventing, limiting or delaying the Company from taking disciplinary action, including immediate termination, in circumstances where the Company deems such action appropriate.

Employee Benefits

Since benefits often change more rapidly than employee handbooks, a disclaimer in this section is appropriate.

Sample Handbook Language

This Employee Handbook description of benefits is only a brief description of Company's benefit plans, and the Company reserves the right to change or terminate the benefits it provides its employees at Company's sole discretion to the full extent of the law.

The following is a brief description of the Company's employee benefits. The Company reserves the right to modify or terminate these benefits at any time, for any reason, consistent with the law. For more complete information regarding any of the Company's benefit programs, please contact _____.

Acknowledgement Forms

When handbooks are distributed, each employee should promise to read the entire handbook and should sign a form acknowledging that they have received and will read. Also, have a management representative witness the acknowledgment. Prepare acknowledgment in duplicate or with a tear-out sheet to be kept in employer's file (or even better, in a safer place where no one but a key employee in HR or Management has access to the acknowledgment, since such acknowledgment forms have been known to somehow "disappear" when there is a potential suspension or termination dispute with an employee).

The acknowledgment disclaimer should include the following: Employee understands the employment relationship is "at-will". Employee understands that only the President (or other officer(s) designated in writing in the handbook) can modify the handbook, in writing. Employer has the right to modify or change any policy at any time.

Sample Handbook Language

I acknowledge that I have received the Company's Employee Handbook which was prepared to provide general information about the Company. I understand that the Handbook is a guideline only and is not a contract of employment between me and Company and that the Company reserves the right to modify this Handbook or amend or terminate any policies or benefits described herein at any time. I understand that the Company and I have the same right to terminate the employment relationship at any time, for any reason or no reason.

I further understand that no supervisor, manager or representative of the company, other than the President, has any authority to enter into any agreement to alter the at-will relationship between me and the Company, and that any such agreement shall

not be enforceable unless in writing and signed by both the President and me.

Overall Comments Regarding Employee Handbooks.

Remember, a general at will disclaimer should also be placed in a Company's written employment applications and written personnel evaluation forms. Adding the at-will disclaimer to these documents weakens an employee's claim that such documents could alter the at-will employment relationship set forth in the handbook. Furthermore, signature line acknowledgments for the employee to sign should be placed at the end of employment applications and personnel evaluations so a company can easily prove that the employee saw and reviewed the documents.

I'VE BEEN SERVED, NOW WHAT?

By: Clayton H. Preece

A complete stranger walks into your business and hands you a stack of papers and says, "You've been served." Now what? If yours is one of the thousands of businesses that do not have in-house legal counsel, you may be wondering what to do, when to do it, and how you ever got to this point in the first place. Additionally, you may feel angry, betrayed, confused, or scared.

Being sued is often described as one of the most stressful experiences that owners of a business may endure. Often there is great risk to the businesses, a disruption of normal operations, and there may even be personal liability for the officers or directors. The purpose of this article is to help businesses begin to prepare now so that if the day comes that your business is served (civilly), you have a plan.

Understanding the Civil Process

The first step towards being prepared in the event of litigation is to understand the judicial process. Generally, there are two different types of court cases, civil and criminal. Civil actions are generally disputes between two individuals or entities. Criminal actions on the other hand arise out of the violation or alleged violation of a federal, state, or local criminal law. This article focuses solely on civil actions, and also does not address small claims actions which have a different process. There are also slight differences in the process depending on the jurisdiction (State or Federal); however, generally a lawsuit progresses as follows:

First, a complaint is drafted, filed with the court and served. A complaint contains the claims or causes of action which the plaintiff (the person or entity bringing the lawsuit) is alleging against the defendant (the person or entity alleged to have committed the harmful acts). A complaint will also usually contain general allegations that basically tell the story of what happened between the plaintiff and defendant.

Complaints must be "served" by an uninterested party on the defendant. Often, the plaintiff will either hire a professional process server or have a local police officer or sheriff serve the complaint. The basic purpose of serving a complaint is to provide notice to the defendant. In addition to the complaint, the process server or officer will also deliver a summons. The summons typically provides information about the court, case number, and consequences for not answering a complaint. For businesses, a complaint may be served on "an officer, a managing or general agent, or other agent authorized by appointment or by law to receive service of process…" Utah Rule of Civil Procedure 4(d)(1)(E).

After the complaint is served, the defendant has a short period of time, in some jurisdictions 21 days, to answer or otherwise respond to the complaint. An answer must respond the allegations in the complaint by either admitting or denying the allegations. Utah Rule of Civil Procedure 8(b). A defendant may "otherwise respond" by filing a motion to dismiss a claim in the complaint. A motion to dismiss may be filed where the plaintiff has failed to sufficiently allege a cause of action upon which relief may be granted, or for other specified reasons. Utah Rule of Civil Procedure 12(b). A defendant may also include a counterclaim alleging any claims or causes of action it may have against the plaintiff. Responding to a Complaint is very important because if a defendant fails to respond, the plaintiff may be able to obtain a default judgment. A default judgment grants the plaintiff's requested relief without the defendant having a chance to offer any defenses.

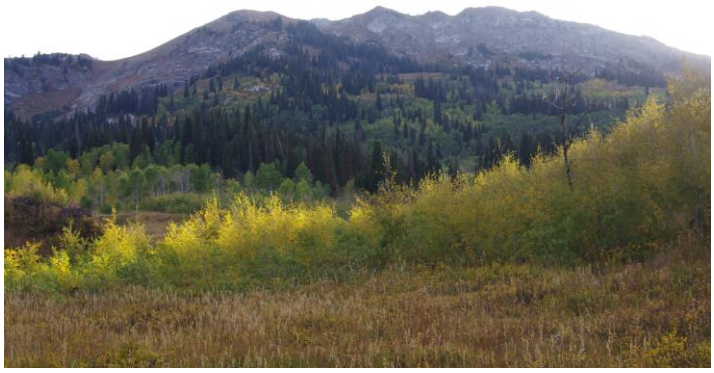
After a complaint has been answered, the lawsuit enters a process called discovery. Discovery may last for a few months or even years if the case is very complex. Courts in the United States have largely done away with trial by surprise. The basic premise is that a just and fair result is more likely to happen if the parties to the lawsuit exchange key documents, information, and witnesses. During discovery, both sides are required to disclose the witnesses and other information that they will rely on to prove their case or defenses. Parties have the opportunity to request documents, have questions answered, and take depositions of key witnesses. Expert witnesses may also be retained and issue reports or be deposed. A deposition is an opportunity for the plaintiff and/or defendant to ask questions to a witness which the witness must answer under oath. It is important to note that if a witness or document is not disclosed, the court may prevent the witness from testifying at trial and may exclude the document from trial.

After or during discovery, the parties may file numerous motions. A motion is a formal request to the court asking it to take a certain action or enter an order. Some motions, such as motions to dismiss or motions for summary judgment, allow the court to dismiss certain causes of action. Parties may request an oral argument with the judge prior to a decision on the motion. At a hearing on a motion, attorneys for a party make arguments, respond to the arguments of the other side and answer any questions the judge may have regarding the facts or law that relates to any motion.

Following discovery, the parties certify to the judge that the case is ready for trial. In a civil case, the trial may be a bench trial (heard by the judge without a jury) or may be before a jury of between 5 to 12 jurors depending on the jurisdiction. In a civil case, if a party wants a jury trial, they must request it.

Prior to trial, the parties, on their own or by an order of the judge, may undergo mediation. Mediation is a process to reach a settlement of the claims in a case by the parties. Mediators are uninterested parties and may be retired judges or experienced attorneys that help the parties see the strengths and weaknesses in their case, with the goal of reaching a settlement agreement between the parties, so that both sides may both avoid the cost and expense of trial.

A bench or jury trial may last for a few hours or months depending on the complexity of the case. Both parties have an opportunity to present witnesses and evidence which supports their position. In a civil case, the general standard of proof is “a preponderance of the evidence.” *Johns v. Shulsen*, 717 P.2d 1336 (Utah 1986). A preponderance of the evidence means that the fact is more likely to be true than not true. This is a different standard than that used in a criminal case, “beyond a reasonable doubt,” when is higher and harder to prove.



After the parties have presented their cases, the judge or jury will issue their verdict. A party may appeal the verdict if they believe the court made an error in an order, misapplied the law, or for numerous other reasons. The appeals process is beyond the scope of this article.

What Can a Business do to Prepare for Litigation

1 Develop a relationship with an attorney. As noted above, after being served there is a limited time period to respond to a complaint and it may be hard to find an attorney that you trust and work well with during the short time you have to respond. Also, litigation can be a long process, and you will want an attorney that you trust. You can usually change attorneys during litigation, but it can be expensive to get a new attorney up to speed on your case. By developing a relationship with an attorney you have a resource to turn to immediately if you are sued. Having a relationship with an attorney may also help you to avoid getting sued in the first place, if you consult with them about terminations, contracts, employee handbooks, etc.

2 Develop a document retention strategy. Documents provide the best evidence of what happened. Memories often fade and having documents will help you to prove what happened during trial. While saving every scrap of paper is impractical and unnecessary, talking with an attorney about what documents should be kept and how long they should be kept is a great way to be prepared for litigation.

3 Talk to an attorney before key events. There are some events that are likely to cause litigation, for example, terminating an employee. There are steps you can take to minimize liability before firing someone. Consulting with an attorney prior to taking an action may help you to have the defenses in place you will need if you are sued. Also, it is advisable to consult with an attorney on contracts. Often there are simple provisions that can and should be included in a contract that will help to decrease your litigation risk and cost.

4 Have a rainy day fund. Litigation is expensive, and having some money set aside for an emergency, like litigation, is not only sound money management advice, but may make a huge difference in being able to respond to litigation and obtaining a favorable result. It may cost over $100,000 to litigate a case all the way through trial.

5 Obtain insurance and know what they will and will not cover. Having insurance is one way to help offset litigation costs and any amount for which the company may ultimately be liable. It is important to talk with your insurer so that you fully understand what the insurance will cover. For example, the insurance may pay for attorneys' fees, costs, and damages for personal injury but not breach of contract. Talk with an attorney about what types of cases may likely be brought against your company and insure accordingly.

PRACTICE PROFILES

Kathryn J. Steffey

Kathryn J. Steffey is a partner at Smith Hartvigsen and has extensive experience in representing a diversity of clients in both state and federal courts. Ms. Steffey has acted as lead counsel for local general contractors regarding multi-faceted construction contract disputes concerning both private and public projects. She has also defended local governments in actions concerning a variety of matters ranging from breach of contract to violation of civil rights to union contract disputes. Ms. Steffey has also provided legal counsel and advice to governmental entities and private corporations regarding compliance with federal and state laws and regulations. In addition to appearing before the Tenth Circuit Court of Appeals, the United States District Court for the District of Utah, the Utah Supreme Court, the Utah Court of Appeals, and the state district courts located throughout Utah, she has also represented clients before state and local administrative agencies, including, but not limited to, the Utah Anti-Discrimination and Labor Division and Utah's Division of Occupational and Professional Licensing.

James W. Stewart

James W. Stewart is of counsel in the law firm of Smith Hartvigsen, PLLC. He is listed by his peers and *Utah Business Magazine* as one of the Legal Elite labor and employment attorneys in Utah. Mr. Stewart has also been listed by the nationwide *Chambers* business publications as one of Utah's key labor and employment attorneys. He represents national, regional, and Utah employers. Mr. Stewart advises employers in virtually all areas of employment law and labor law, and frequently defends employers in court litigation and arbitration in employment disputes at both the trial and appellate level. He has been the director of employment law continuing education programs for the Utah State Bar. Mr. Stewart frequently gives employment law seminars for business. He has written numerous employment law publications and is a former editor of the *Utah Employment Law Letter* and the *Brigham Young University Law Review*. Mr. Stewart has served as a founding member for the First American Inn of Court and has been a board member and president of the Utah Lawyers for the Arts. He earned a Bachelor's of Arts, magna cum laude, a Juris Doctorate, and a Master's in Business Administration from Brigham Young University. Mr. Stewart also served as a judicial clerk to the Honorable Stephanie Seymour, U.S. Federal Court of Appeals for the Tenth Circuit. In addition, Mr. Stewart has substantial experience providing transactional advice to businesses and represents businesses in other corporate and commercial litigation.

For regular updates and best practices relating to labor and employment law, subscribe to the Employment Law for Utah Employers and Businesses blog at https://employmentlawyerutah.com or subscribe to the twitter feed @UTemploylaw.

Clayton H. Preece

Clayton H. Preece is an associate in the law firm of Smith Hartvigsen, PLLC. He represents businesses and employers in a wide range of litigation matters including labor and employment. Mr. Preece assists both national and local businesses with their labor and employment concerns. Mr. Preece is an author and editor of the Employment Law for Business Blog. Additionally, Mr. Preece represents individuals, businesses, and governmental entities, relating to land use and zoning, construction litigation, commercial litigation, natural resources litigation, and corporate and business transactions. He also serves on the Utah State Bar's Unauthorized Practice of Law Committee and serves the community through the University of Utah's Street Law Clinic. Mr. Preece earned his Juris Doctorate from The George Washington University Law School in Washington, D.C. For his outstanding trial advocacy, Mr. Preece earned a position representing The George Washington University Law School in the American Bar Association's Labor and Employment Trial Advocacy Competition. Mr. Preece also served for two terms as the Chair of the National Religious Freedom Moot Court Competition. Mr. Preece is a former editor of the *Federal Communications Law Journal*. Mr. Preece earned his Bachelor's in Arts from Utah Valley University, graduating summa cum laude and valedictorian, where he also was the editor in chief of the *Intersections Journal*.

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Smith|Hartvigsen is a law firm comprised of attorneys, paralegals, legal assistants, and staff who are dedicated to professionalism and providing quality legal services to our clients. To us, professionalism means using our combined decades of experience to zealously advocate for our clients and to develop creative and effective solutions to our clients' problems. Professionalism means listening to our clients, and working within our clients' budgets to accomplish their goals. Professionalism means promptly responding to our clients' emails and phone calls, and keeping our clients informed regarding all aspects of their case. Professionalism means being big enough to handle large complicated matters, but small enough to provide personal service to each client. Professionalism means always striving to be the most knowledgeable experts in our areas of practice, and practicing law with the highest level of ethics, integrity, and ability. We look forward to meeting your legal needs by serving as your counsel and demonstrating to you our commitment to professionalism. Smith Hartvigsen represents individuals, businesses, and governmental agencies in almost all areas of law, including, Water Law, Family Law & Estate Planning, Municipal, District, and Local Government Law, Real Estate, Land Use and Redevelopment, and both trial and appellate litigation.

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EMPLOYMENT LAW FOR UTAH EMPLOYERS AND BUSINESSES

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DISCLAIMER